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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY ALLEN ARMSTRONG,

Defendant and Appellant.

H033574

(Santa Clara County
Super. Ct. No. CC817421)

I. INTRODUCTION

Defendant Timothy Allen Armstrong pleaded guilty to petty theft with a specified prior conviction (Pen. Code, § 666).¹ He was placed on probation and ordered to pay attorney fees in the amount of \$300. On appeal, defendant contends that there was insufficient evidence to support the court's implied finding that he had the present ability to pay the attorney fees pursuant to section 987.8.

For reasons that we will explain, we will order the abstract of judgment modified to strike the order to pay attorney fees of \$300. As so modified, we will affirm the judgment.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

II. FACTUAL AND PROCEDURAL BACKGROUND

On September 9, 2008, defendant was charged by complaint with petty theft with a specified prior conviction (§ 666). The complaint alleged that defendant stole, took, and carried away “the property of Lucky’s.”

On October 24, 2008, defendant pleaded guilty² and sentencing took place immediately thereafter. The trial court suspended imposition of sentence and placed defendant on probation for three years with certain terms and conditions. The court ordered defendant to report to the probation department within three days of his release from custody and “referred” him “to the Department of Revenue for determination of ability to pay fines and fees.” Defendant was ordered to serve 240 days in jail and granted a total of 73 days of custody credits. The court imposed various fines and fees, made a general order of restitution, ordered defendant to give a blood specimen, ordered him not to possess any firearm or ammunition, and notified him that he was subject to search and seizure by any peace officer without probable cause. The court eventually stated: “Order attorney fees of \$300.” The court then asked whether defendant understood and accepted the conditions of probation, and defendant responded affirmatively. The court subsequently imposed a monthly probation supervision fee.

Defendant filed a timely notice of appeal on November 7, 2008.

III. DISCUSSION

On appeal, defendant contends that the record does not contain sufficient evidence to support a finding that he has the ability to pay \$300 in attorney fees and, consequently, the trial court’s order that he pay those fees should be stricken.

² The facts underlying defendant’s offense are not included in the record on appeal. There was no preliminary hearing nor was a probation report prepared in this case. While the prosecutor and defense counsel stipulated that the factual basis for defendant’s plea was contained in an “investigation report,” that report is not included in the record on appeal.

Section 987.8 provides that “[i]n any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof.” (§ 987.8, subd. (b).) “If the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county” (§ 987.8, subd. (e).)

“ ‘Ability to pay’ means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant’s present financial position. [¶] (B) The defendant’s reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant’s reasonably discernible future financial position. . . . [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant’s financial capability to reimburse the county for the costs of the legal assistance provided to the defendant.” (§ 987.8, subd. (g)(2).)

A finding of a present ability to pay need not be express, but may be implied through the content and conduct of the hearing. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 71, 76.) Although the finding may be implied, the attorney fees order cannot be upheld on appeal unless it is supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347; *People v. Kozden* (1974) 36 Cal.App.3d 918, 920.)

In this case, defendant argues that his reasonably discernible future financial position for the six months following the October 24, 2008 hearing (see § 987.8, subd. (g)(2)(B)) “did not appear promising” and his prospects of obtaining employment within

those six months (see § 987.8, subd. (g)(2)(C)) were “bleak,” in view of the court’s order that he serve 240 days in jail (notwithstanding the court’s award of 73 days of custody credits). Defendant also contends that the order requiring him to pay other fines and fees would “bear[] upon” his financial capability to pay the attorney fees.

In the absence of any other evidence regarding defendant’s present or future financial position, the likelihood of him gaining employment, or any other factor bearing upon his financial capability, we determine that there is nothing in the record to support an express or implied finding that defendant had the present ability to pay attorney fees in the amount of \$300. As defendant points out, there is no evidence that he was employed at the time of his arrest or that he had any assets.

In their respondent’s brief, the People do not argue the sufficiency of the evidence concerning defendant’s ability to pay. Instead, the People contend that defendant has failed to demonstrate that “he is entitled to relief based on the record before this court.” The People maintain that the trial court simply determined that “the *cost* of the legal services provided [defendant] was \$300 and it ordered him to pay that amount *contingent* on a determination of his ability to pay by the County Department of Revenue.” (Italics added.) The People observe that the record on appeal does not reflect “whether [defendant] went to the Revenue Department as ordered for an ability to pay determination, what amount the parties calculated in light of that determination (if any), whether an actual dispute arose regarding that amount, or if [defendant] requested a subsequent judicial hearing to challenge the Revenue Department’s determination.” According to the People, defendant thus “has not demonstrated that he is entitled to relief” The People maintain that defendant’s remedy, “if he disagrees with the Revenue Department’s determination,” is to seek a hearing in the trial court and, if he is dissatisfied with the resultant ruling, he may appeal the court’s ruling at that point.

In reply, defendant maintains that although the trial court referred him to the Department of Revenue for a determination of his ability to pay fines and fees, the court

ultimately ordered him to pay various fines and fees, including attorney fees, “without the benefit of that determination. Thus, the order was already made by the conclusion of the sentencing hearing, and any finding by the Department of Revenue would have been made too late.” Defendant argues that the court never made any provision for the Department of Revenue “to report back to the . . . court for a final determination,” and “only the court may make a determination regarding the defendant’s ability to pay.”

We agree with defendant and conclude that the record reflects that the trial court ordered defendant to pay attorney fees without first determining his present ability to pay, as required by section 987.8.

At the October 24, 2008 hearing, the trial court referred defendant to the Department of Revenue for a “determination of ability to pay fines and fees.” After imposing various fines and fees and setting forth certain terms and conditions of probation, the court stated: “Order attorney fees of \$300.” In ordering the attorney fees, the court did not qualify the order or mention any future inquiry by the Department of Revenue. In the clerk’s minutes for October 24, 2008, next to the phrase “FINES/FEES: PAY TO,” the box for “Ref to DOR” is marked. However, the minutes also reflect that the court imposed \$300 in attorney fees.

Under section 987.8, a determination that a defendant has the present ability to pay is a prerequisite for entry of an attorney fees order (§ 987.8, subd. (e)), and only the court may “make a determination” regarding a defendant’s ability to pay (§ 987.8, subd. (b); see also § 987.8, subd. (e)). The Department of Revenue’s role, if any, is to *inquire* into the defendant’s ability to pay: “The court may, in its discretion, order the defendant to appear before a county officer designated by the court *to make an inquiry* into the ability of the defendant to pay all or a portion of the legal assistance provided.” (§ 987.8, subd. (b), *italics added*.) Although the court in this case may have intended to condition the precise amount of attorney fees on the Department of Revenue’s subsequent inquiry into defendant’s ability to pay, the court nevertheless did order defendant to pay attorney fees.

No provision was made for the Department of Revenue to report back to the court prior to a final determination of the issue, and the court did not set a further hearing on defendant's ability to pay. Rather, near the conclusion of the hearing on October 24, 2008, the court stated: "Order attorney fees of \$300."

We therefore determine that the record reflects that the trial court ordered defendant to pay \$300 in attorney fees without first determining his present ability to pay, and there is insufficient evidence to support a finding that defendant had the present ability to pay those fees. In light of the small amount of the fee order and in the interests of judicial economy, we will strike the fee order rather than remand the matter for further proceedings.

IV. DISPOSITION

The judgment is modified by striking the order to pay \$300 in attorney fees. As so modified, the judgment is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

DUFFY, J.